

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Robert Fletcher Herbert,)	C/A No. 3:13-262-JFA-PJG
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
Benjamin F. Treaster, and Daryl Scott Barber,)	
)	
Defendants.)	
)	

The plaintiff, Robert Fletcher Herbert (“Herbert”), a self-represented state prisoner, filed this action alleging violations of his constitutional rights. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) DSC for a Report and Recommendation on the defendants’ motion for summary judgment. (ECF No. 41.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Herbert of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the defendants’ motion. (ECF No. 44.) Herbert filed a response in opposition (ECF No. 58), and the defendants replied (ECF No. 59). Having reviewed the parties’ submissions and the applicable law, the court finds that the defendants’ motion should be granted.

BACKGROUND

The allegations raised in Herbert’s Complaint appear to arise from events surrounding Herbert’s arrest. He specifically alleges that Defendant Treaster racially discriminated against him and violated his Fourth Amendment rights by “letting a white male suspect leave the scene.” (Compl., ECF No. 1 at 3.) Herbert also alleges that Defendant Barber violated his Fourth and

Fourteenth Amendment rights in that he reviewed Treaster's report and did not question Treaster about it. (Id.) Herbert seeks monetary relief.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248. Moreover, this court recognizes that while the determinations of credibility and the weighing of evidence are matters for the jury and not the court, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Cruz v. Beto, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Defendants' Motion for Summary Judgment

1. Official Capacity Claims

To the extent that Herbert is suing the defendants in their official capacities for monetary relief, they are entitled to summary judgment. The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Sovereign immunity protects both the State itself and its agencies, divisions, departments, officials, and other “arms of the State.” See Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989); see also Regents of the Univ. of California v. Doe, 519 U.S. 425, 429 (1997) (“[I]t has long been settled that the reference [in the Eleventh Amendment] to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.”).

As arms of the state, the defendants are entitled to sovereign immunity and cannot constitute “persons” under § 1983 in that capacity. See Will, 491 U.S. at 70-71; Gulledge v. Smart, 691 F.Supp. 947, 954-55 (D.S.C. 1988) (concluding that sheriffs and deputy sheriffs are agents of the state and cannot be sued in their official capacities). Although a State may waive sovereign immunity, Lapides v. Board of Regents, 535 U.S. 613 (2002), the State of South Carolina has specifically denied this waiver for suit in federal district court. See S.C. Code Ann. § 15-78-20(e). Accordingly, to the extent the defendants are sued in their official capacities, they are immune from suit. Will, 491 U.S. at 70-71; see also Quern v. Jordan, 440 U.S. 332, 343 (1979) (recognizing that Congress did not override the Eleventh Amendment when it created the remedy found in 42 U.S.C. § 1983 for civil rights violations).

2. Defendant Barber

Herbert’s Complaint does not appear to allege that Defendant Barber personally participated in the denial of Herbert’s constitutional rights. Rather, Herbert appears to raise claims against Barber in his supervisory position over Defendant Treaster. The doctrine of respondeat superior cannot support liability under § 1983. Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691-94 (1978). The law is clear that personal participation of a defendant is a necessary element of a § 1983 claim against a government official in his individual capacity. See Trulock v. Freeh, 275 F.3d 391, 402 (4th Cir. 2001). “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). Mere knowledge is not sufficient to establish personal participation. Id. As the Iqbal Court observed, because masters do not answer for the torts of their servants in § 1983 cases, “the term ‘supervisory liability’ is a misnomer.” Id.

at 677. Indeed, the dissent in Iqbal opined that “[l]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating [] supervisory liability entirely.” Id. at 693 (Souter, J., dissenting). Moreover, even if the majority in Iqbal did not entirely dispense with the concept of liability of a supervisor in a § 1983 case, the instant Complaint fails entirely to plead facts sufficient to go forward on such a theory based on Fourth Circuit precedent. See Carter v. Morris, 164 F.3d 215, 221 (4th Cir. 1999); Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994) (outlining the requirements to hold a supervisor liable for constitutional injuries inflicted by their subordinates). Accordingly, Defendant Barber is entitled to judgment as a matter of law.

3. Defendant Treaster

Herbert’s Complaint appears to allege that Defendant Treaster racially discriminated against him and violated his Fourth Amendment rights by “letting a white male suspect leave the scene.” (Compl., ECF No. 1 at 3.) Herbert later declares that Treaster did not conduct a proper investigation and made a “false supplemental report” which allegedly resulted in Herbert losing his “job, house, cars and trust of [his] parents.” (Herbert Decl., ECF No. 31 at 1-2.)

The Complaint is filed pursuant to 42 U.S.C. § 1983, which “ ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’ ” Albright v. Oliver, 510 U.S. 266, 271 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). A legal action under § 1983 allows “a party who has been deprived of a federal right under the color of state law to seek relief.” City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state

law. West v. Atkins, 487 U.S. 42, 48 (1988). In addition, a plaintiff must affirmatively show that a defendant acted personally in the deprivation of his or her constitutional rights. Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977).

In support of their motion for summary judgment, the defendants have provided affidavit testimony from Defendant Treaster. (Treaster Aff., ECF No. 41-2.) Treaster avers that on July 12, 2012, he responded to a possible arson at a given address in order to provide security for the Crime Scene Investigation (“CSI”) unit. (Id. ¶ 6, ECF No. 42-2 at 2.) Treaster avers that he was not at the crime scene for an investigatory purposes. (Id.) Treaster testifies that during the time he was providing security for the CSI unit, he broke up an argument that occurred between several individuals, but he did not ask any of the individuals involved any questions regarding the arson. (Id. ¶ 7.) Treaster avers that after the CSI unit completed its investigation, he left the crime scene and filed a supplemental report regarding the argument that he broke up. (Id. ¶¶ 8-9.) Treaster avers that this supplemental report was reviewed by his supervisor, Master Deputy Daryl Scott Barber, who found no errors. (Id. ¶ 9.) Herbert’s filings do not refute Treaster’s affidavit testimony. Accordingly, as it is clear that Treaster did not act personally in any alleged deprivation of Herbert’s constitutional rights, Treaster is entitled to summary judgment as a matter of law.

D. Other Claims

To the extent that Herbert is attempting to assert any other claims, his Complaint fails to state a plausible claim for relief. See Iqbal, 556 U.S. at 667-68. To the extent that Herbert’s Complaint could be construed to state any claims arising under state law, the court should decline to exercise supplemental jurisdiction over those claims. See 28 U.S.C. § 1367(c).

RECOMMENDATION

For the foregoing reasons, Herbert is not entitled to the relief he seeks against the defendants. Accordingly, the court recommends that the defendants' motion for summary judgment be granted. (ECF No. 41.) In light of the court's recommendation, Herbert's motion for a speedy trial should be terminated as moot. (ECF No. 26.)



Paige J. Gossett

UNITED STATES MAGISTRATE JUDGE

January 13, 2014
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).